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IN THE

Supreme Court of the United States

October Term, 1977

No. 77-152

BETH ISRAEL HOSPITAL,

Petitioner,

v.

NATIONAL LABOR RELATIONS BOARD,

Respondent,

and

MASSACHUSETTS HOSPITAL WORKERS' UNION LOCAL 880, SERVICE EMPLOYEES' INTERNATIONAL UNION,

Intervenor.

BRIEF FOR THE UNION

OPINIONS BELOW, JURISDICTION AND STATUTES INVOLVED

The citations to the opinions below and the basis of the Court's jurisdiction are set forth at pp. 1-2 of the Brief for Beth Israel Hospital (hereinafter "Pet. Br."). The statutes involved are set out at Pet. Br. 2-3.

QUESTION PRESENTED

Whether the National Labor Relations Board properly determined that a hospital employer violated the National Labor Relations Act by an absolute ban on union solicitation and distribution of union literature in a cafeteria of the hospital where:

(a) 77% of the users of the cafeteria were employees, 12% were physicians, volunteers and others who worked for the hospital, 10% were visitors and only 2% were patients;

(b) the employer proffered no evidence that the forbidden union solicitation or distribution had or would have any adverse effect on patients; and

(c) the Board found (and the Court of Appeals sustained the finding) that the employer routinely permitted non-union solicitation and the distribution of non-union materials in the cafeteria.

STATEMENT OF THE CASE

A. Introduction

Rule 40(e) of this Court provides that the brief of an appellant or petitioner on the merits shall contain "A concise statement of the case containing all that is material to the consideration of the questions presented * * *". These materials are generally understood to include the pertinent record evidence and the findings which underlie the conclusions of the tribunals whose decisions are under review. To be sure, if the statement is to be "concise", it must be selective, and the advocate's perspective may, within reason and fairness, guide the inclusion or exclusion of particular materials. But it is striking that in this instance petitioner has chosen to select *out* all of the record evidence (with the single exception of the Hospital's rule itself, see Pet. Br. 5, n.1),[1] and all of the Administrative Law Judge's findings

[1] The no-solicitation/no distribution rule presently before the Court is a *revised* rule put into effect after the charges herein were filed; this rule not only prohibits distribution of literature and certain kinds of solicitation in the cafeteria and coffee shop areas but also "prohibit[s] 'one-to-one/solicitation'" between employees in those areas. (Pet. Br. 4.) Petitioner states that the rule was made more stringent "in order to obtain from the Board a complete delineation of the parameters for no-solicitation and no-distribution rules in public areas of a non-proprietary hospital . . ." (Pet. Br. 4), and represents that the change was merely a reversion to the rule in effect prior to intervention by the Massachusetts Labor Relations Commission (Pet. Br. 40). In fact, it appears that the original rule, promulgated in 1970, did permit some forms of "solicitation"; the rule allowed "Petitions, discussions; etc. amongst Hospital personnel . . . on a person to person basis at coffee breaks, mealtimes, or after the working hours of all those involved . . ." and, during working hours, "ordinary conversations, discussions, etc. which do not interfere with the work or the rights of others" were allowed." (App. 60). Even after the advent of the Union, the hospital's first position was that "employees should feel free to discuss anything with anyone outside of working and patient care areas and outside of working hours." (App. 62). After the state litigation, the Employer restated its rule as to solicitation (as opposed to distribution) as follows:

> "[A]s has always been our policy, employees may continue to discuss any matter, including unions, during specified non-work times and may engage in such discussions with fellow employees also not at work in employee only areas or in areas where patients, visitors and employees not on duty are permitted to congregate and intermingle, *such as the cafeteria and coffee shop.*" (App. 65, emphasis supplied.)

See also App. 67:

> "In the cafeteria and coffee shop, conversations may take place on a one-to-one basis but there is to be no setting up of special tables, public distribution of literature, nor any form of coercion".

Thus, it is plain that the prohibition of "one-to-one solicitation" in the cafeteria and coffee shop by employees—that is, apparently, or applied to union organization, simple private discussions among employees in which one employee tries to persuade the other of

which were approved by the Board, and in turn by the Court of Appeals. Thus, petitioner presents to this Court an abstract question of law, and asserts an absolute right of hospitals to bar union solicitation and union distribution in all areas to which patients have access. The reason for petitioner's litigation strategy will readily appear when the facts found by the Board are considered.

B. The Facts

Beth Israel Hospital employs approximately 2200 persons. (App. 28). It maintained, at the time this case arose, a cafeteria and a coffee shop; these were the only facilities on the premises available to employees who wished to purchase meals.[2] (App. 13). Although these facilities were open at most times [3] to anyone on the premises, including patients and visitors, about 77% of those using the facilities were regularly employed at the hospital. (App. 124).[4] Another 12%, approximately, were other persons working at the hospital in some capacity—students, volunteers, attending physicians, women's auxiliary members, and private duty nurses. (*Id.*) Less than 2% of the cafeteria users and coffee shop users were patients, and less than 10% were visitors. *(Id.)*

Employees often discussed their work with each other in the cafeteria, and that discussion sometimes involved comments critical of patient care. (App. 40) The cafeteria and coffee shop were regularly used by organizations (including the hospital itself) and individuals seeking to reach a broad cross-section of hospital employees as an area for posting notices, distributing literature, setting up informational tables, and soliciting contributions.

> "Thus, during March posters publicizing the hospital's 'buck a day' program, a cost reduction effort, were

his or her view concerning the need for union—was begun for the first time in 1975, and was *not* the same rule put into effect in 1970 before unionism became an issue in the hospital.

[2] "A modern cafeteria is provided for all employees where nutritious, well prepared meals may be purchased at reasonable prices. The Coffee Shop is open 24 hours per day to provide light refreshments for personnel, house staff and guests." (Employers Handbook, App. 55)

[3] Between 10:30 and 12 p.m., a midnight supper is served for employees only. (App. 28-29.)

[4] Some of these persons were paid by Harvard University rather than by Beth Israel Hospital. (*Id.*)

> displayed in the cafeteria. A travel brochure rack is situated adjacent to the nonofficial bulletin board, a car pool board is posted in the same area, and during National Nutrition Week a table was set up in the cafeteria on which was placed literature concerning nutritional ideas . . . Moreover, from time to time certain commercial literature has appeared on a table underneath the nonofficial bulletin board * * * [5] Since at least 1966, the hospital has permitted solicitation for the United Fund and for the Combined Jewish Philanthropies at tables set up in the cafeteria for the distribution of pledge cards. Also, there is evidence of similar distribution of newsletters giving information concerning the establishment of a credit union for employees, inviting volunteers to provide medical assistance to Israel, and patient information booklets; on occasion, there have been collections for employee gifts on such occasions as weddings, births and so forth. . . ." (223 NLRB at 1196).

There is no evidence in the record to indicate that any effort was ever made to curtail any of these activities pursuant to the no-solicitation/no distribution rule.

There was evidence presented as to one particular incident concerning application of the no-solicitation/no-distribution rule to union solicitation.[6] Ms. Anne Schunior, an employee, passed out a union newsletter, "As We See It", in the cafeteria, and was consequently issued a disciplinary warning (App. 73-75). Ms. Schunior testified that she could generally tell the difference between employees and other

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[5] This literature included tennis camp advertisements, magazine subscriptions, film envelopes, and insurance applications (App. 6).

On the non-official bulletin, located in the cafeteria, "notices and posters listing activities not officially sponsored by the Hospital may be placed" without any official approval. (App. 59).

[6] The rule in question at the time of this incident was the less stringent rule permitting "one-to-one" solicitation in the cafeteria and coffee shop.

people eating in the cafeteria.[7] Among the differences Ms. Schunior noted between employees and other diners were: employees are supposed to wear name tags and generally do; many employees wear uniforms; employees eat in the cafeteria daily and are recognizable by other employees after a while; employees eat in groups, while visitors often do not; inpatients wear wristbrands and, sometimes, are dressed in bedclothes. Before distributing literature to a few people whose employee status she was not sure of, she "asked if they were employees, and explained that she was passing out literature for employees". (App. 38).

Moreover, the hospital itself distributed a newsletter to employees, which sometimes contained discussion of the unionization issue and which was received by employees at their work stations (App. 21, 61-70). And, the hospital, in a newsletter distributed to visitors to the hospital, published material which could certainly be unsettling to some people—for example, an article about rising rape statistics, with a "red headline entitled 'RAPE, RAPE' " (223 NLRB at 1198).

Under the revised no-solicitation/no distribution rule here pertinent, neither oral solicitation of any kind nor distribution of union literature was permitted except in "employee locker rooms and certain adjacent restrooms."[8]

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[7] This testimony—that it is possible for a careful employee organizer to limit distribution in the cafeteria to employees—was credited by the ALJ (223 NLRB, at 1195) and was, in fact, essentially uncontradicted. That is, while the hospital personnel director stated that she herself could not *necessarily* distinguish employees from non-employees, she agreed that she could do so in many instances—by personal acquaintance or recognition, by the wearing of name tags, and because in-patients wear identification bracelets (App. 48, 52).

[8] The hospital is in a congested area (App. 22); it does not appear that there are any outdoor grounds at all, and while the record is not clear in this regard, it seems that the only employee parking lot

Because many employees' lockers are not in locker rooms, but, rather, in areas to which there is public access, and because several employee locker rooms are security areas to which only the particular employees assigned are allowed entry, only 613 lockers are located in the areas in which free solicitation and distribution of union literature by any employee are allowed (223 NLRB at 1197, App. 30, *et seq.*). Thus, under the hospital's rule, employees seeking to discuss the union question with other employees, or to distribute union literature were likely to reach at best a minority of the 2200 employees at the common place of work.

Also noteworthy is what the record does *not* show. Although "one-to-one" union solicitation was allowed in the cafeteria and coffee shop for a time, there is no evidence that any patient or visitor was ever disturbed thereby. While the union newsletter did contain much material critical of patient care at Beth Israel, there is no evidence whatever that any union newsletter ever came into the possession of any patient or visitor. There was also no testimony, medical or otherwise, concerning whether union solicitation or distribution alone, in a noisy cafeteria in which there are many conversations going on between employees and several other kinds of notices, solicitation and distribution of literature occurring, is likely to upset patients.[9]

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at the time of the events giving rise to this case was several blocks away and was used by employees of several hospitals in the area, not by Beth Israel employees alone. (App. 29).

[9] There was some evidence that patients have been upset by *other* kinds of conversations in the cafeteria—specifically, conversations which draw upon private information concerning individual patients. (App. 138-140). Nonetheless, although staff doctors have been politely asked to "[p]lease be mindful of the potential impact of your comments" (App. 139), such indiscretions are *not* listed as a ground for discharge of employees, as is violation of the no solicitation/no distribution rule and no rule regarding such conversations has apparently been promulgated with regard to em-

C. The Opinions Below

The Administrative Law Judge, whose rulings, findings, and conclusions were as pertinent here affirmed by the Board, held, on the basis of the foregoing facts that "the Employer's according of 'solicitation privileges to non-union matters while withholding them when union matters were involved is disparate treatment forbidden by the Act.' " (223 NLRB at 1198.) He rejected the argument that this discrimination was somehow justified by the need to keep controversial matters from patients and visitors, noting that the hospital itself distributed literature on the union question in work areas, and distributed directly to visitors material which could be controversial. (*Id.*) Therefore, he "was not persuaded that the Respondent has offered any convincing evidence to demonstrate that the rule is needed either by reason of actual or suspected interference." *(Id.)*

The Court of Appeals, noting that "[r]ules which prohibit union solicitation on the employer's property during non-working time in any location have been held to be presumptively unreasonable in the absence of special circumstances * * * the rules prohibiting distribution of literature are likewise * * * presumptively invalid if applied during non-working time in non-working areas" (554 F.2d at 480) held, first, that "[t]he burden * * * was on the hospital to show special circumstances," and, second, that "on this record * * * the Board was [not] compelled to hold that Beth Israel met this burden." *(Id.)* As to the arguments that the literature distributed might upset patients, the Court noted that the hospital may not "assume that irresponsible behavior will be the norm," and, in fact:

> "[t]here was no evidence that literature, offensive or otherwise, was distributed to patients or visitors. * * * If in the future employee organizers deliberately distribute 'scurrilous' literature to patients or visitors, the hospital may well have cause to discipline such employees. In any event * * * [the hospital's] argument might at most justify a rule directed at offensive literature." (*Id.*, at 481.)

ployees generally (App. 58). Such conversations continue to occur (App. 40, 53).

ARGUMENT

I. The Board Correctly Determined That Petitioner's Rule Prohibiting Solicitation and Distribution Is Unlawful Under the Principles Which Have Been Approved by This Court.

A. *The General Principles Governing Employer Rules Which Limit or Ban Union Solicitation and Distribution.*

Under the common law an employer was free without any limitation to discipline an employee because he talked to another employee on company property, because he distributed a leaflet, or because of the subject matter of the discussion or distribution. The National Labor Relations Act placed a significant limitation on that employer power. As this Court stated in its most recent decision in point:

> "The place of work is a place uniquely appropriate for dissemination of views concerning the bargaining representative and the various options open to the employees. So long as the distribution is by employees to employees and so long as the in-plant solicitation is on nonworking time, banning of that solicitation might seriously dilute § 7 rights. For Congress declared in § 1 of the Act that it was the policy of the United States to protect 'the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing.' " (*NLRB* v. *Magnavox Co.*, 415 U.S. 322, 325-326.)

Thus:

> "The Board * * * earl[y] held that solicitation outside working hours but on company property was protected by § 7 and that a rule prohibiting it was

'discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline.' *In re Peyton Packing Co.*, 49 N.L.R.B. 828, 843-844. We approved that ruling in *Republic Aviation Corp.* v. *NLRB*, 324 U. S. 793, 801-803." (*Id.* at 324.)

As the *Republic Aviation* Court explained, the Board had proceeded by developing a series of presumptions as to the validity of employer rules prohibiting union solicitation. In sustaining those presumptions, the Court quoted with approval the Board's formulation in the *Peyton Packing* case:

> "The Act, of course, does not prevent an employer from making and enforcing reasonable rules covering the conduct of employees on company time. Working time is for work. It is therefore within the province of an employer to promulgate and enforce a rule prohibiting union solicitation during working hours. Such a rule must be presumed to be valid in the absence of evidence that it was adopted for a discriminatory purpose. It is no less true that time outside working hours, whether before or after work, or during luncheon or rest periods, is an employee's time to use as he wishes without unreasonable restraint, although the employee is on company property. It is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee outside of working hours, although on company property. Such a rule must be presumed to be an unreasonable impediment to self-organization and therefore discriminatory in the absence of evidence that special circumstances make the rule necessary in order to maintain production or discipline." (49 NLRB at 843-844, quoted at 324 U.S. at 803-804, n.10)

And, as the Administrative Law Judge observed in this case:

> "Subsequent decisions have applied and refined the *Peyton Packing* rule, and the present Board policy may be summarized as follows:
>
> (1) A rule forbidding distribution of union literature by employees in working areas is presumptively valid even when applied to working and non-working time.
> (2) A rule forbidding distribution in non-working areas during non-working time is presumptively invalid.
> (3) A rule forbidding union solicitation by employees during their non-working time, even though limited to working areas, is presumptively invalid.
> (4) A rule forbidding union solicitation during working time in any plant area is presumptively valid.
> (5) A presumption of validity may be overcome if it can be shown that the rule is discriminatory rather than attributable to the right of the employer to protect his legitimate property interests." (223 NLRB at 1197)

As the Board and the Court of Appeals held, petitioner's rule is presumptively invalid under paragraphs 2 and 3 above, and petitioner failed to prove "special circumstances" that validate its rule. As we now show, petitioner's contentions (1) that these principles, though generally sound, may not be applied to hospitals (Pet. Br. 19-23) and (2) that petitioner did meet its burden of proof (*id.* 23-25), are without merit. We show further (3) that even if the burden of proving illegality was with the General Counsel, he met that burden by showing that the rule discriminated against union solicitation on its face and as applied.

B. *These General Principles Are Applicable to Hospitals and Require Invalidation of Petitioner's Rule.*

(1) Petitioner argues that because the Board has recognized the existence of special circumstances overcoming the presumption of invalidity in "strictly patient care" areas of the hospital,[10] the Board was required to reach the same

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[10] *St. John's Hospital and School of Nursing, Inc.*, 222 NLRB 1150, enforcement denied, 557 F.2d 1368 (C.A. 10).

conclusion with respect to all "areas where patients and visitors have access" (Pet. Br. 19).

But the Board's acceptance of the proposition that there are special circumstances in "strictly patient care" areas does not require it to reach the same conclusion without further evidence as to other areas of the hospital such as the cafeteria. *Republic Aviation* itself teaches that the Board has wide latitude to establish "the requirements of proof" which it "consider[s] appropriate to outweigh or overcome the presumption as to rules against solicitation [and distribution]," (324 U.S. at 803; see also *id.* at 798-800.) The distinction drawn by the Board, far from being arbitrary as petitioner charges, is entirely reasonable. It is intuitively obvious that a high measure of quiet and employee concentration are required in patient care areas. In contrast, it is just as plain that in other areas of a hospital the natural disorder of passageways and the relaxed atmosphere of gathering places prevails. The norm in such areas is the bustle of movement, the sounds of conversation, radio and television and the sight of people reading or exchanging reading material. All this the Board was plainly entitled, if not indeed, required, to take into account in determining whether the burden of demonstrating a need to restrict employee communication on union organization should be on the employer.[11] As the Court of Appeals for

[11] In considering whether the Board properly placed upon the hospitals the burden of establishing special circumstances which justify curtailing employees normal § 7 rights, petitioner's insistence that it possesses "the medical expertise required to determine what rules are necessary to preserve the medical well-being of persons under its care" (Pet. Br. 18) is self-defeating: For, "• • • the ordinary rule, based on considerations of fairness, does not place the burden upon a litigant of establishing facts peculiarly within the knowledge of his adversary. *United States* v. *New York, N.H. & H.R., Co.*, 355 U.S. 253, 256, note 5." (*Campbell* v. *United States*, 365 U.S. 85, 96.) See also *NLRB* v. *Great Dane Trailers*, 388 U.S.

the Seventh Circuit explained in *Lutheran Hospital of Milwaukee* v. *National Labor Relations Board*, 564 F.2d 208, 215 (footnote omitted):

> "Moreover, the Board's recognition that solicitation or distribution might be unsettling in immediate patient care areas does not undermine its holding that these activities would not be disturbing outside those locations. Solicitation or distribution might be undesirable in immediate patient care areas for two reasons. First, there is an obvious need in such areas for quiet • • • Second, these areas are the location where employees perform the function of patient care. • • •
>
> "But these factors are not present outside of immediate patient care areas. Patients and visitors do not require absolute quiet in cafeterias and lounges. And as we observed earlier, employees in those locations are not acting in their professional capacity, so that organizational activities cannot interfere with their job performance or with the provision of patient care. Thus, a typical patient or visitor would be indifferent to solicitation or distribution conducted outside of immediate patient care areas. This is true not because a patient is well enough to leave his room, but because the conduct of employees in locations such as cafeterias or lounges is irrelevant to the ordinary patient." [12]

26, 34: "• • • once it has been proved that the employer engaged in discriminatory conduct which could have adversely affected employee rights to some extent, the burden is upon the employer to establish that he was motivated by legitimate objectives since proof of motivation is most accessible to him."

[12] The Seventh Circuit disagreed with the Board's distinction between ambulatory and non-ambulatory patients; in all other respects it approved the Board's reasoning. While petitioner observes that the Seventh Circuit "enforc[ed] an order of the Board upon a factual record of differing from that developed in the case at hand" (Pet. Br. 22), it does not describe what differences there are other than the names of the parties. Indeed, the very point petitioner argues is that it is not called upon to make a factual record showing special circumstances. See also pp. 2-3, *supra*.

(2) Petitioner argues that the ruling here that the hospital's restriction on union activity in the cafeteria is presumptively invalid is inconsistent with the line of cases [13] holding that the prohibition of solicitation and distribution in "selling" areas of stores, restaurants and other retail establishments is presumptively valid (Pet. Br. 30-31). But contrary to that contention, the only similarity between this case and those involving restaurants is that they all concern eating places. And the Board has uniformly and correctly recognized that not all eating places are the same.

As the *Peyton Packing* case stated: "time outside working hours • • • during luncheon or rest periods is an employee's time to use as he wishes without unreasonable restraint • • • [it] is therefore not within the province of an employer to promulgate and enforce a rule prohibiting union solicitation by an employee" during those periods. (49 NLRB at 843-44.) Thus, rules prohibiting union solicitation or distribution in employee lunch rooms and cafeterias have always been understood to be the type of ban on union activity in *non-working* areas that is presumptively invalid. "We find, as did the Trial Examiner, that • • • the application of the Respondent's no-solicitation rule to lunch periods when employees may properly be away from their places of work is in itself unlawful". (*I. F. Sales Co.*, 82 NLRB 137, 138, enforced 188 F.2d 931 (C.A. 6); *Monarch Machine Tool Co.*, 102 NLRB 1242, 1250-1251, enforced 210 F.2d 183, 186-187 (C.A. 6) cert. denied, 347 U.S. 967.) On the other hand, on the ground that "selling" areas including those of a restaurant, are *working* areas open to third persons, the Board, as already noted, has treated broad no solicitation/no distribution rules as presumptively valid.

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[13] See, *e.g.*, *May Department Stores Co.*, 59 NLRB 967, enforced as modified, 154 F.2d 533 (C.A. 8), cert. denied, 329 U.S. 725, and *Goldblatt Bros., Inc.*, 77 NLRB 1262.

In drawing the distinction between these different types of eating places the Board has been engaged in the "work of applying the Act's general prohibitory language in the light of the infinite combination of events that might be charged as violative of its terms • • • left to the [Agency by the Act]" (*Republic Aviation*, 324 U.S. at 798.) This would be the end of the matter if all eating places were open only to employees or only to the general public. But as this case shows, they are not. Thus, where an employer provides an eating facility open to his employees and to others, the Board must decide which presumption is more reasonable. Here, the Board concluded that the *Sales-Monarch* approach rather than that of *May-Goldblatt* should be followed. On the facts presented, that determination cannot be faulted. For the record demonstrates that the primary function of the facility was to serve the hospital's staff and not its patients and guests. Eighty-nine percent of the customers were staff. Consistent with that function the cafeteria was recognized by the hospital and its employees as a proper place for the exchange of information on a wide variety of subjects. (See pp. 2-6 *supra*.) In these circumstances it was plainly proper for the Board to place the burden of justifying a restriction on union solicitation and distribution on the hospital.

(3) There is a separate and independent ground for sustaining the Board's order even if the cafeteria were characterized as a "working area", or if the presumption of the no distribution/no solicitation rule's invalidity is deemed to be unjustified for some other reason. Even where a rule is presumptively *valid*, that presumption can be rebutted. And, as the ALJ correctly stated, under Board policy: "(5) A presumption of validity may be overcome if it can be shown that the rule is discriminatory rather than attributable to the right of the employer to protect his legitimate property interests." (223 NLRB at 1197.)

This principle, which was already articulated in *Peyton*

Packing, see p. 9, *supra,* has been frequently reaffirmed[14] and is not disputed by petitioner. But Petitioner contends that its "No-Solicitation, No-Distribution Rule Was Not Discriminatorily Applied", (Pet. Br. 35, heading). We submit that the contention need not be considered.

The Administrative Law Judge found "that the [employer] utilizes the cafeteria area for communication with employees" (223 NLRB at 1198), a finding buttressed by considerable detail (*Id.* at 1196). The Board adopted the finding, which was in turn approved by the Court of Appeals: "The Board's conclusion that the hospital had not carried its burden of showing special circumstances receives further support from the ALJ's supported finding that numerous non-union distribution activities have been routinely permitted in the cafeteria and coffee shop." (544 F.2d at 481, n.3). Thus, what was said in *Golden State Bottling Co.* v. *NLRB,* 414 U.S. 168, 174, is equally in point here:

> "On this state of the record, there is no justification for this Court's intervention, since *Universal Camera* precludes us from substituting our judgment for that of the Court of Appeals. This is not the place . . . to reverse a Court of Appeals because were we in its place we would find the record tilting one way rather than the other . . . ." *NLRB* v. *Pittsburgh S. S. Co.,* 340 U.S. 498, 503 (1951); see *Central Hardware Co.* v. *NLRB* 407 U.S. 539, 548 (1972)."

But assuming that the discrimination determination can be challenged at this point, it is clear that the Board's conclusion is entitled to stand. Petitioner does not controvert the evidentiary findings below. Rather, it contends that "[i]t is the controversial, as opposed to noncontroversial, nature of the conversation or printed matter" that distinguishes communications regarding union matters from

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[14] See, *e.g.*, the cases cited by the Court of Appeals, 544 F.2d at 481, n.3.

the communications which petitioner permitted. (Pet. Br. 15.) That contention (a) distorts what was found concerning petitioner's actual practice and (b) is fundamentally unsound in principle.

(a) The findings belie the contention that only what petitioner refers to as "innocuous type of solicitation (blood drives, car pool lists, baby gifts, etc.) [was] permitted in the cafeteria". (*Id.*; see 223 NLRB at 1196 quoted at pp. 4-5, *supra.*)

(b) In any event, there is no warrant in experience for treating the communication with respect to union matters as being inherently more controversial and more likely to create anxiety among patients than any of countless other public issues.[15] Such subjects are, of course, freely discussed in petitioner's cafeteria and in the newspapers which patients and their visitors find there, as well as in the radio and television programs available to patients and their visitors in lounges throughout the hospital. As the Seventh Circuit said in *Lutheran Hospital:* "We cannot believe that patients and their visitors who are present in these areas [cafeterias and lounges] are likely to become 'un-

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[15] Nor can it be rightly said that the solicitation of money on behalf of charitable organizations is invariably non-controversial. Depending on their views on the abortion issue, patients and visitors would have strongly conflicting views as to the desirability of contributing money to Catholic charities, or Planned Parenthood, and there are doubtless those among the general public served by Beth Israel Hospital to whom the United Jewish Appeal is anathema. Even the United Givers Fund, or similar combined charitable appeals, are controversial with many because of the uses which they make or do not make of contributions, or because of their competition with drives such as that of the Black United Fund. For example, a recent newspaper headline declared: "United Way Accused of Monopoly In Fight Over Charitable Funds" (*New York Times,* Monday, April 3, 1978, p. 1, columns 2-3).

settled' upon exposure to organizational activities conducted by employees. Labor unions are common entities in this country, and only an extraordinary patient would be so dismayed at witnessing an attempt to form one that his health would actually become impaired." (564 F.2d at 215.) Petitioner also omits mention of its own newsletter which is distributed to employees at their work stations and sometimes discusses the same unionization issue concerning which the employees are forbidden to distribute material in the cafeteria, and of the newsletter that it distributes *to patients* which includes material which is certainly far from "innocuous", such as an article about the rising incidence of rape. (See p. 6, *supra*.)

And, we submit that it is independently decisive instead that although "actual patients of Beth Israel have expressed the feeling that it is upsetting to overhear discussions of patient care matters by doctors (Pet. Br. 28) the hospital has promulgated *no rules* prohibiting or circumscribing such conversations; instead that fact is relied on as purported justification for barring entirely different communications by employees. Petitioner's failure to implement this "medical decision", with which all would intuitively agree, and which does not adversely affect employee § 7 rights, casts the gravest doubt on the *bona fides* of its claim that its rule was motivated purely by a desire "to protect its patients from the potentially harmful effects of such controversial [union] matters". (Pet. Br. 35.)

The short of the matter is that petitioner's rule violates the Act because it places greater restraints on union communications than on others thereby reversing the priorities which Congress has established in furtherance of the policy of the United States "to protect 'the exercise • • • of workers' full freedom of association.' " (*Magnavox, supra*, 415 U.S. 326, quoting § 1 of the NLRA). Discussion of that subject by employees, not least in the form of "solici-

tation" of union membership,[16] and the distribution of literature discussing union affairs among employees is affirmatively protected by §§ 7 and 8 of the Act against employer interference, the charitable or other solicitations described at Pet. Br. 35, be they ever so desirable, have not been granted the same Congressional protection.[17] Nor did Congress subject the enjoyment of these employee rights to the judgment of employers. Thus, petitioner is fundamentally in error when it contends "that the unique nature of a hospital places it outside the scope of the traditional area of NLRB labor relations expertise". (Pet. Br. 13.) The ultimate issue in this case is whether the statutory rights of the employees to communicate with each other concerning self-organization is to be overriden by other interests. The resolution of that issue, the striking of that balance, is a responsibility which Congress did not commit to hospitals, or to any other employers, but to an agency of its own creation—the National Labor Relations Board.

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[16] Petitioner's effort to forbid union solicitation when it does not forbid discussion generally brings to mind this Court's recognition in *Thomas* v. *Collins*, 323 U.S. 516, 535, that a sharp line cannot be drawn "between discussion, laudation, [and] general advocacy [of unionism] and solicitation [of union membership]." That being so, the Hospital's rule would have been discriminatory even if all fund raising had been forbidden, because it barred conversations urging union membership while permitting conversations on all other subjects.

[17] To the extent that the cases cited at Pet. Br. 36 makes special allowances for charitable and similar solicitations they are inconsistent with other Board decisions. (See, *e.g.*, *William L. Bonnell Co.*, 164 NLRB 110, 112; *Summit Nursing Home, Inc.*, 196 NLRB 769, 770, enforcement denied, 472 F.2d 1380 (C.A. 6).) Moreover, insofar as the Board cases support petitioner's distinction they defeat the "central purpose of [§§ 8(a)1 & 3] to protect employee self-organization • • • from disruptive interferences by employers" (*American Ship Bldg.* v. *Labor Board*, 380 U.S. 300, 317) and are therefore wrong as a matter of law, (see *id.* at 316-318).

As we show in Part II of this brief, Congress did not, when it subjected petitioner and other non-proprietary hospitals to the Act for the first time, diminish the Board's authority to forbide employer rules which interfere with employee § 7 rights. For that reason, petitioner's criticism of the court below for allegedly showing excessive deference to the Board's view—a decision to which petitioner prefers another court's almost summary reversal of the Board [18]—is wholly misguided. (See, e.g., *NLRB* v. *Fleetwood Trailer Co.*, 389 U.S. 375, 378 and cases cited *id.*; *NLRB* v. *Pipefitters*, 429 U.S. 507, 528, 531-532; *NLRB* v. *Iron Workers, Local 103*, 46 U.S.L.W. 4081, 4085.)

II. The 1974 Amendments and Their Legislative History Establish That the Board Was Not Required to Adopt Special Policies Limiting the Rights of Hospital Employees to Communicate With Respect to Union Organization.

In support of its proposition that the mere fact that organizational activity takes place in a *hospital* is in itself sufficient to displace the usual presumptions regarding solicitation/distribution, rules, and the necessarily concomitant assertion that the Board's determination to the contrary is not entitled to its usual weight because of an absence of medical expertise in the Agency, petitioner relies in part upon the 1974 Health Care Amendments and their legislative history. That history, it is said, shows that Congress intended the Board to "develop rules especially tailored to govern employee organization in the unique setting of a hospital." (Pet. Br. 13.) In fact, that law and its history conclusively demonstrate the opposite—that Congress intended to apply the same basic substantive rules of law developed over years of experience in labor relations generally to employees of nonprofit hospitals, except for *par-*

[18] *NLRB* v. *Summit Valley Nursing and Convalescent Home*, 472 F.2d 1380 C.A. 6).

ticular special rules contained in the 1974 Amendments, and certain detailed instructions to the Board contained in a Committee Report. Otherwise the Board was expected to fulfill its well-established role as the expert agency charged with primary authority to apply the Act.

Further, while those special rules did attempt to lessen the danger of actual disruption of services to patients by providing for notice prior to strikes or picketing and for a greater emphasis on mediation in the resolution of contract disputes than that contained in the NLRA generally, (see §§ 1(c)-1(e) of the 1974 Amendment, amending § 8(d) and adding § 8(g) to the NLRA, and § 213 to the LMRA (29 U.S.C. § 158(d) and (g); 29 U.S.C. § 183), Congress affirmatively refused to outlaw strikes or picketing altogether. Thus, Congress not only was willing to suffer, in the interest of employee rights, an immeasurably greater potential impact upon patients than solicitation of union membership and distribution of union literature in a few limited areas can possibly cause, but also demonstrated a complete lack of concern regarding any impact upon patients and visitors resulting from mere *knowledge* of the existence of a labor dispute.

A. First, the principal purpose of the 1974 Amendments was, of course, to *remove* the special exemption for nonprofit hospitals contained in the Taft-Hartley Act. S. Rep. No. 93-766, 93d Cong., 2d Sess., at 3 (hereafter "S. Rep."); H.R. Rep. No. 93-1051, 93d Cong., 2d Sess., at 4 (hereafter "H.P. Rep."). Thus, the Act "restore[d] to the employees of non-profit hospitals the *same* rights and protections enjoyed by the employees of proprietary hospitals and most all other employees [because] the public interest demands that employees of health care institutions be accorded the same type of treatment under the law as other employees in our society * * *". (H. Rep., at 4; see also S. Rep., at 3, 4.)

Over and over again the legislative history of the 1974

Act demonstrates the underlying premise of that Act to be that hospitals are *not* special in any way which justifies depriving their employees of the basic rights enjoyed by other employees under the NLRA. It was pointed out repeatedly that employees of hospitals are in at least as much need of aid from unions as other employees.[19] Thus, the basic principle of the 1974 Act was that stated by Senator Williams:

> "[N]ow that private hospitals have become a major industry, they should be treated the same as other industries in their business and labor relations, subject to the same regulations, obligations, and rights * * *. [E]mployees of nonprofit hospitals will no longer have

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[19] "During the last 2½ years, hospital wage increases have lagged far behind those received by workers in other industries * * * The long hours worked and the small reward received by hospital workers result in a constant turnover with a consequent threat to the maintenance of an adequate standard of medical care." (Leg. Hist., at 93 (remarks of Sen. Cranston).)

"[T]he medical industry * * * is the largest industry by far in the United States. The lowest people on the scale are those who swab the floors, who carry the bedpans, who are the nonprofessionals. It is to prevent their exploitation * * * that this legislation is needed." (Leg. Hist. 289 (remarks of Rep. Thompson).)

"Many hospital workers have been exploited through the years. Many women and blacks are employed in hospitals at despicably low wages * * * It is important that those workers in non-profit hospitals be given the opportunity to choose a union to represent them." (Leg. Hist., at 306 (remarks of Rep. Burke).)

"S. 3202 simply grants to nonprofit hospital workers the rights of union organization which other workers have long enjoyed, because they are low paid, with wages often below bare subsistence levels, these workers are in great need of the right to join unions and to bargain collectively * * * There can be no justification for discrimination against those men and women or for maintaining a double standard * * *" (Leg. Hist., at 405 (remarks of Rep. Badillo).)

> to maintain their status as second-class citizens in this area of labor relations." (Leg. Hist., at 95, 359.)

This declaration of equality applied both to substantive rules of law and to the role of the NLRB in developing and enforcing that law. This is evident, of course, from the simple fact that, rather than creating a special enforcement procedure, or a specialized agency to deal with labor relations in hospitals, Congress in this respect simply eliminated an exception and thereby committed hospital labor relations to the general procedures of the NLRA. But this point was also affirmatively stated. In response to a claim that the Act should not preempt specialized state medical labor relations agencies, because "they have people who have had experience", it was noted that the NLRB has "had the experience with the health care * * * profit hospitals * * * [T]hey do have the experience, and there will not be the situation which the gentlemen fears." (Leg. Hist. 319 (remarks of Rep. Thompson)).

B. Congress, of course "recognized the need to avoid disruption of patient care wherever possible." (S. Rep., at 6; H.R. Rep., at 8). But, Congress did not leave to the Board, or to the courts, the task of fashioning specialized rules toward this end. Rather, Congress itself delineated the particular areas in which "special consideration" (S. Rep. at 3; H.R. Rep., at 4) was needed—"notice requirements and other procedures related to potential strikes and picketing." (S. Rep., at 3, H.R. Rep., at 8.) And, Congress itself, over strong arguments that strikes and picketing either could not be tolerated at all in hospitals (see, e.g., S. Rep. at 39 (individual views of Sen. Dominick); Leg. Hist., 300, remarks of Rep. Henderson)) or should be prohibited for a sixty-day cooling off if there was a threat of substantial interference with the delivery of health care,[20] specified that

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[20] An amendment to this effect was passed by the House of Representatives, but was altered in Conference to provide for special dispute resolution provisions in such circumstances while permitting

even in this area where actual disruption of care could occur, only limited restraints on the exercise of employees' rights was to be tolerated. Thus, strikes and picketing were subjected only to a ten-day notice requirement, "to give health care institutions sufficient advance notice of a strike or picketing to permit them to make arrangements for the continuity of patient care". (S. Rep., at 4, H.R. Rep., at 5.) And, to facilitate settlements of contract disputes without strikes and to expedite the settlement of strikes once they begin, mediation was made mandatory, a longer period of time for notice of termination or modification of agreements was provided, and provision was made for a Board of Inquiry in certain instances to recommend settlement terms before the expiration of an agreement. (NLRA §§ 8(d), 8 (g); LMRA § 213.)

Indeed, the form of the limitations upon strikes and picketing demonstrates that Congress, while concerned to minimize the possibility of actual disruption of care by providing effective alternative dispute resolution mechanisms, was fully cognizant that some disruption *would* occur under the Amendments; the ten-day notice was designed to maximize the ability of hospitals to cope with that disruption, not to prevent it from occurring. And, obviously, a patient is much more likely to be harmed by a severe staff cutback, or by being transferred to another health care facility because of an inability of the hospital to provide care, or by being denied care altogether in non-acute situations for a time, than by mere knowledge of the potentiality of such problems or of a disagreement among employees concerning unionization. Nonetheless, while aware of such possibilities, Congress rejected the proposals to deny or drastically circumscribe the right to strike of hospital employees. Indeed, the *retention* of the right to strike and to picket is inconsistent with the notion that there is a patient

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the strike to continue. See Leg. Hist. 322-329, 349; § 213 of the LMRA, 29 U.S.C. § 183.

interest strong enough to override employees' rights in being shielded from any manifestation of union activity. For, obviously, a patient or visitor who approaches a hospital surrounded by pickets will be well aware that there is union activity. And, a patient who is either treated by a skeleton staff or turned away or transferred because of a strike will not only be aware of a labor dispute but will be directly, rather than hypothetically, affected by it.

The legislative history cited by petitioner confirms our understanding that Congress went so far, but no further, to provide special treatment to hospitals. The passage from the Senate Report quoted at Pet. Br. 10-11 is the beginning of a sentence which reads as follows: "In the Committee's deliberations on this measure, it was recognized that the needs of patients in health care institutions required special consideration in the Act *including a provision requiring hospitals to have sufficient notice of any strike or picketing to allow for appropriate arrangements to be made for the continuance of patient care in the event of a work stoppage.*" (S. Rep. 11, emphasis added to show the portion omitted in petitioner's brief.) And, the passage from the Senate Report quoted at Pet. Br. 11 with emphasis, and in one instance with double emphasis, is from a section of that Report entitled "Effect on Existing Law" (S. Rep. 12-14). The Report there sets out all the matters with respect to which the Committee believed that the Board should have special instructions on how to apply the Act and existing Board policies (such as those concerning the determination as to whether a person is a supervisor) to hospitals. The passage seized on by petitioner appears in a subsection entitled "Priority Case Handling"; and in the paragraphs after those quoted, the Committee notes that it has carefully considered the Board's priorities and provides: "some observations and directions to the Board" on that subject. That Congress so painstakingly delineated the matters as to which the Board was to accommodate the hospital's special function, compels the inference that the Board was other-

wise free to follow the "existing law". Additionally, it was observed in the legislative debates that the resulting balance was a "compromise" (Leg. Hist. 112 (remarks on Sen. Taft)), "a very carefully developed and finely tuned balance of competing considerations and philosophies that will, at the same time, protect labor and management rights and promote good health care." (Leg. Hist. 91 (remarks of Mr. Cranston)). Indeed it was expressly stated that

> "the National Labor Relations Board in administering the Act should understand specifically that [the] Committee understood the issues confronting it, and went as far as it decided to go and no further, and the Labor Board should use extreme caution not to read into this Act by implication—or general logical reasoning—something that is not contained in the bill, its report and the explanation thereof • • • [I]n this carefully tailored legislation Congress decided to treat the health care industry uniquely in certain respects. It decided to go so far, and no more. I trust this bill will be treated • • • in the same spirit." (Leg. Hist. 361, (remarks of Sen. Williams).)

Given the hospitals' litigation posture since the passage of the 1974 Amendments, it is particularly striking that although many representatives of hospitals and of hospital associations appeared before Congress to express concern about continuity of patient care in the event of a strike, and the possible fragmentation of bargaining units, none so much as suggested that the mere knowledge of employee efforts to organize might adversely affect "the health and well-being" of patients. (Pet. Br. 35.) Nor were there any suggestions that the Act be further amended to alter the long-established *Peyton Packing* presumptions. Even if not impeached by previous silence, the hospitals' contention in this and other cases that allowing such communications would impair "the ability of the Hospital to provide complete medical care and has infringed upon the rights of innocent third parties" (Pet. Br. 7-8), is addressed to the wrong forum. Only Congress has power to grant a broad

legislative exemption for a class of cases, and once Congress has determined what special rules to accommodate the needs of patients there shall be, it is most emphatically *not* "left to this Court to formulate guidelines to govern the question of solicitation and distribution of union literature in a hospital and its environs so as to insure that the rights of those innocent third parties, hospital patients, are protected." (Pet Br. at 8.)

C. There is a suggestion in petitioner's brief that Congress had no need to provide any special rule regarding solicitation in hospitals because the rule for which the hospital contends had been established by the Board with respect to proprietary hospitals in *Guyan Valley Hospital, Inc.*, 198 NLRB 107. But petitioner misstates what the Board decided in *Guyan Valley*. The passage at 198 NLRB 111 which is quoted at Pet. Br. 15 is from the Administrative Law Judge's decision in that case, and his reasoning was *not* adopted by the Board, which said in *Guyan Valley:*

> "In adopting the Trial Examiner's finding that the no-solicitation rule herein is lawful, we note that, unlike the rule condemned in *Summit Nursing and Convalescent Home, Inc.*, 196 NLRB No. 110, Respondent's rule was adopted before, and therefore not in response to, the Union's campaign; and, further, that *the rule herein prohibits solicitation only in the hospital's working area.*' Chairman Miller dissented from the finding of a violation in *Summit, supra,* but in any event agrees that the no-solicitation rule in the present case was lawful. Member Fanning dissents from the majority's conclusion that Respondent's broad no-solicitation rule is a valid rule. In his opinion there is no substantial distinction between the rule announced by the Respondent in this case and that considered by the Board in *Summit Nursing, supra.*" (198 NLRB 107, n.2; emphasis added.)

Thus, *Guyan Valley* involved solicitation only in working areas, and the case did not involve a cafeteria utilized primarily by employees; indeed, that much appears even from the Administrative Law Judge's decision as quoted at Pet.

Br. 15. The pre-1974 Board case which did involve a hospital cafeteria was *Bellaire General Hospital (Monterey Life Systems)*, 203 NLRB 1105. The Board there upheld an ALJ's determination that a hospital violated § 8(a)(1) by a non-solicitation policy indistinguishable from that of the petitioner in this case because it made "no distinction with respect to location, whether in patients' rooms, at nurses' stations, in cafeteria, on parking lots, etc.; nor with respect to time, whether on lunchtime, break-time, or immediately before or after work" (*id.* at 1108); the ALJ supported his conclusion that the "limitations now imposed were violative" on the basis of a supervisor's "testimony that on March 27 he 'more specifically' told [the discrimininatee] that the employees were prohibited from soliciting or distributing literature at the timeclock or on the cafeteria line; they might do these things while seated at a table, but not to employees at another table * * *" (*id.* at 1109).

Petitioner "question(s) whether the Board is in fact entirely free to cast aside prior rulings and to adopt new policies," (Pet. Br. 16). If the answer to that question is that the Board's prior ruling with respect to solicitation in proprietary hospitals was frozen by the 1974 Amendments, petitioner must lose this case, given *Bellaire* and what was actually decided in *Guyan Valley*.[21] But though the legislative history shows that Congress was informed of those decisions,[22] we do not contend that they were ratified by the

[21] For the same reasons, the Court of Appeals for the District of Columbia Circuit erred in relying on *Guyan Valley*. (*Baylor Medical Center* v. *N.L.R.B.*, quoted at Pet. Br. 15.)

[22] Chairman Miller submitted to the Senate Committee on Labor and Public Welfare a "Listing of Complaint and Representation Cases Involving Proprietary Hospitals" *Guyan* and *Bellaire* were included in the list of complaint (unfair labor practice) cases; none of the other cases involved the validity of a no-solicitation or no-distribution rule. (Hearings before the Subcommittee on Labor of the Committee on Labor and Public Welfare, United States Senate, 93d Congress, 1st Sess., on S. 794, etc., at 696.)

enactment of the 1974 Amendments. It is entirely sufficient to sustain the Board's decision that Congress left the Board free to apply its normal policies respecting solicitation and distribution to hospitals. And this the 1974 Amendments and the Committee Reports *do* make clear, by providing hospitals with certain limited exceptions to the NLRA, and by expressly instructing the Board with respect to those matters with which Congress was sufficiently concerned to conscribe the agency's normal discretion.

CONCLUSION

For the foregoing reasons, the judgment of the Court of Appeals should be affirmed.

Respectfully submitted,

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